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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-1396**

INTERNATIONAL BUSINESS MACHINES CORPORATION,

*Petitioner,*

*vs.*

GREYHOUND COMPUTER CORPORATION,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MAY IT PLEASE THE COURT:

### QUESTIONS PRESENTED

1. Has petitioner waived its claimed right to a non-jury trial by not asserting it until after ten years after this action was filed and after a directed verdict in a jury trial was reversed and remanded for trial by the Court of Appeals?

2. Is "complexity" of the issues in an antitrust treble damage action grounds for denying a right to a jury trial, notwithstanding the Seventh Amendment to the Constitution?

3. If question 2 be answered in the affirmative, is this case so "extraordinarily complex" as "to exceed the practical abilities and limitations of a jury"?*

## STATEMENT

Respondent Greyhound disagrees with the "Question Presented" in IBM's petition for reasons which are evident by an additional Statement.**

This antitrust damage action was filed in an Illinois state court on October 28, 1969. It was later removed to an Illinois federal court. Another action, filed on September 4, 1970, in an Illinois federal court, was consolidated with it. After pretrial proceedings in Minnesota, it was transferred to the Arizona District Court on May 18, 1972. Trial began on May 23, 1972. At all times there was a jury demand by Greyhound. The District Court, at the close of Greyhound's case, directed a verdict for IBM. Greyhound appealed on July 14, 1972. On August 17, 1977, the Court of Appeals held that a jury could reasonably find, that IBM, by various trade practices, had violated § 2 of the Sherman Act by monopolizing, and attempting to monopolize, the leasing of general purpose commercial computers. (559 F. 2d 488, cert. den. 434 U. S. 1040.)

After remand, Greyhound filed an amended pleading, making its complaints against IBM more current. It was not *until 1979* that IBM, for the first time, contended that Greyhound was not entitled to a jury trial under the Seventh Amendment because of the alleged "complexity" of the case.

* Respondent has the right to urge in "Questions Presented" any argument in support of the judgment in its favor, including contentions not passed on by the court below (Stern & Gressman, *Supreme Court Practice,* 4th ed. (1969), p. 314).

** This additional Statement, like IBM's statement, will refer to facts not contained in the Court of Appeals record, in view of the limited nature of that record, resulting from its denial of permission to appeal under 28 U. S. C. § 1292(b).



On November 6, 1979, the district judge, who was a different judge from the one who tried the case the first time, wrote an opinion in which he characterized this case as "complex" and said trial to the Court would substantially shorten it and avoid the danger of a hung jury, but was of the view that he had no authority to strike the jury demand. He entered an order denying the motion to strike the jury demand "for lack of authority to grant such motion." (App. B to Pet.)

Pursuant to 28 U. S. C. § 1292(b), the Court certified the question whether it had authority to strike the jury demand as involving a controlling question of law. Thereafter, IBM filed a petition for permission to appeal; Greyhound answered. While the petition was pending, the Court of Appeals decided *In re U. S. Financial Securities Litigation,* 609 F. 2d 411 (C. A. 9, Dec. 10, 1979).* There, in very complex securities litigation, the ninth circuit held that there was no "complexity" exception to the Seventh Amendment right to a jury trial in civil cases and reversed an order of the District Court striking demands for a jury trial.

In this case, the Court of Appeals on February 1, 1980, denied IBM's petition for permission to appeal, citing the foregoing decision, and stating: "the issue of law raised by the petition has been definitively resolved in this circuit." (Pet. App. A) Because of the nature of its ruling the Court of Appeals found it unnecessary to pass upon other issues raised by Greyhound's answer, which are included in the Questions Presented above.

Although the petition states that the question presented is whether the Federal District Court has authority under the Constitution to strike a jury demand "in a case of such extraordinary complexity as to exceed the practical abilities and limitations of a jury", the District Court did not certify such a question, and the Court of Appeals, in denying the petition,

* A certiorari petition to review the Court's decision has been filed under the name of *Gant* v. *Union Bank,* Docket No. 79-1383.

did not decide it. When the Court of Appeals held that there was no complexity exception to the right to jury trial under the Seventh Amendment, this made it unnecessary to determine whether this case was in fact "too complicated" for a jury to understand—assuming such question was before it.*

The only record that the Court of Appeals had was the District Court's Order and certification, IBM's petition and Greyhound's answer. Under Rule 5 of the Federal Rules of Appellate Procedure, the record of the District Court is transmitted, and the appeal docketed, only when permission to appeal is granted. Consequently, it would not be possible for this Court to determine, even if it granted the writ, whether this case was in fact too complicated for a jury to understand unless it took judicial notice of the Court of Appeals opinion reversing the directed verdict, and assumed that additional issues raised by the amended complaint would not materially affect the "complexity" of the case.

## REASONS FOR DENYING THE PETITION

1.

### The Petition Should Be Denied Because IBM Had Waived Its Claim to a Non-Jury Trial.

It was not until after this case had been to the Court of Appeals, which reversed and remanded a directed verdict for IBM, and ten years after the action was filed, that IBM, for the first time, contended that this case was too complicated for a jury. IBM relies primarily on a footnote in *Ross* v. *Bernhard*, 396 U. S. 531, decided by this Court in 1970. Under the chronology of events given, this case had been decided two years before the present case went to trial. IBM at no time questioned the propriety of a jury trial, either in the District Court at the first trial, or in the Court of Appeals on Greyhound's appeal.

* The finding of the District Court in this case is not the same as the one made in the *U. S. Financial* case. There the District Court found "that the legal and factual issues were of such complexity as to be beyond the practical abilities and limitations of a jury." 609 F. 2d at p. 413.



Rule 38 *F. R. C. P.* requires that a jury demand be filed not later than ten days after the service of the last pleading directed to an issue triable by a jury, otherwise there is a waiver. It would be most anomalous to hold, that although a party to a jury trial must assert it within a specified time or waive his constitutional right, that a party who claims a constitutional right* to a non-jury trial can wait until more than ten years after the action has been filed, and after the case was tried to a jury but a directed verdict reversed by the Court of Appeals, to assert his claim for the first time.

This is a particularly appropriate case to deny the petition because of a waiver. IBM's assertion of a right to a non-jury trial is a transparent effort to sidestep the adverse holding of the ninth circuit. Under the "law of the case" rule, there will be jury issues as to whether IBM violated § 2 of the Sherman Act if the evidence on retrial is substantially the same. But if IBM succeeds in its present petition, it will attempt to avoid its defeat in the Court of Appeals by contending in the District Court that it, as the trier of fact, has a right to find the facts, unhampered by the views of the Court of Appeals as to what a jury reasonably could find.

* IBM claims a denial of due process if it is not granted a non-jury trial. (Pet., 15, 16)

2.

**The Petition Should Be Denied Because IBM's "Question Presented" Does Not Present a Question of Law, That Was Passed Upon Either by the District Court or the Court of Appeals, but a Question of Law, Intermingled with a Question of Fact, Which Cannot Be Determined from the Record in the Court of Appeals.**

IBM states that the question presented is whether the federal court has authority under the Constitution to strike a jury demand "in a case of such extraordinary complexity as to exceed the practical abilities and limitations of a jury." The District Court, although it found this was a "complex case," never found that it was so complex as to exceed the practical abilities and limitations of a jury.

The answer to the question presented by IBM involves both one of law and one of fact. The question of law presented is whether there is a "complexity" exception to the right to a trial by jury guaranteed by the Seventh Amendment. The question of fact, presented only if the first question be answered in the affirmative, is whether this case is too complicated for a jury to understand. But under 28 U. S. C. § 1292(b), review of factual matters cannot be obtained, but only of controlling "questions of law." (*Link* v. *Mercedes-Benz of North America, Inc.*, 550 F. 2d 860, 863 (C. A. 3, 1977), cert. den. 431 U. S. 933.)

The only legal question presented by the Court of Appeals decision is whether there is a "complexity" exception to the right of trial by jury guaranteed by the Seventh Amendment. If this question be answered in the negative, as the Court of Appeals held, then the question of how "complex" a case must be before a right to a trial by jury is lost is never reached.

Similarly, in this case, the Court of Appeals never had to reach the factual issue—assuming it was before it—and this Court cannot determine from a record certified by the Court of



Appeals whether this case is in fact so complicated that a jury cannot comprehend it.

Hence, IBM in effect is asking this Court to render an advisory opinion, or decide an abstract question because while a negative answer as to whether there is a "complexity exception" would determine that Greyhound has a right to a jury trial, an affirmative answer would not determine that it was not. Whether this case is too complicated for a jury to understand would be for the District Court to decide in the first instance, subject to further review by the Court of Appeals and by this Court.

3.

**The Petition Should Be Denied Also Because the Decision of the Court of Appeals Was Correct and Is Not in Conflict with Decisions of any Other Court of Appeals or of This Court.**

IBM asserts that the ninth circuit refused to follow the test for a jury trial set forth in *Ross* v. *Bernhard,* 396 U. S. 531 (1970) where, in a footnote, this Court said "as our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries." (p. 538, footnote 10)

IBM contends that this footnote is authority for reexamining the right to jury trial in a complex treble damage antitrust case in light of "the practical abilities and limitations of juries." This interpretation misstates the meaning of the *Ross* footnote and inaccurately portrays the holding of the case.

Although IBM places heavy reliance on the footnote, it fails to inform this Court that the *text* annotated by this footnote reaffirms that "there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of common

issues existing between the claims." (p. 538) In addition, the footnote applies, not to determining whether cases are tried to juries, but to the prospective determination of whether newly created *causes of action* are legal or equitable. Thus, the footnote refers to determining "the 'legal' nature of an issue * * *." (p. 538, n. 10) Unfortunately for IBM, the "legal" nature of an antitrust treble damage claim has already been determined by this Court. *Ross* does not suggest that this determination be reexamined. Indeed, *Ross* reaffirms it.

This Court in *Ross* relied on the holding in *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U. S. (1916) that treble damage antitrust suits *must* be tried to a jury. It stated (p. 535):

> "[Mr. Justice Holmes] concluded that when the penalty of triple damages is sought, the antitrust statute plainly anticipated a jury trial and should not be read as 'attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law.'"

Thus, *Ross*, the case on which IBM most heavily relies, is actually contrary to its position.*

The importance of third part of the *Ross* footnote was also undercut by the decision of this Court in *Curtis* v. *Loether*, 415 U. S. 189 (1974). In *Curtis*, this Court held that the Seventh Amendment guaranteed the right of jury trial in cases arising under the fair housing provisions of the Civil Rights Act of 1968. The standard announced in *Curtis* did not include a consideration of the practical limitations of juries. This Court said (p. 194):

> "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if

* In the *Financial Securities* litigation, it was contended that because of the complicated accounting and financial problems presented the action was "analogous to an action for an equitable accounting where historically there has been no right to a jury." (609 F. 2d at p. 423). Even IBM does not seriously contend that equity ever entertained jurisdiction because treble damages, in the nature of a penalty, were recoverable by statute.



> the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."

Although the *Ross* case was decided in 1970, it was not until 1976 that a district court, for the first time, interpreted the footnote as making a complexity exception to the right to trial by jury guaranteed by the Seventh Amendment, *In re Boise Cascade Securities Litigation*, 420 F. Supp. 99 (D. C. Wash., 1976). No court of appeals has ever made such a holding, IBM's petition to the contrary notwithstanding.

At page 12, IBM cites five Court of Appeals opinions and states that they conflict with the ninth circuit's holding. *In each of the cited cases, the court held there was a right to jury trial although some of the cases* by way of dicta, interpret the *Ross* dicta as making a complexity exception to the right of trial by jury under the Seventh Amendment.

In view of the scholarly opinion of the Court of Appeals in the ninth circuit in *In re U. S. Financial Securities Litigation*, it seems superfluous to add anything further to what that court said. That court reviewed prior holdings of this Court, including such well known decisions as *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469; *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959). It stated at page 425:

> "After employing a historical test for almost 200 years, it is doubful that the Supreme Court would attempt to make such a radical departure from its prior interpretation of a constitutional provision in a footnote."

4.

**The Petition Should Be Denied Because This Case Is Not in Fact so Extraordinarily Complex as to Exceed the Practical Abilities and Limitations of a Jury.**

The District Court characterized this case as a "complex one," and stated that a non-jury trial would be shorter and would avoid the possibility of a hung jury. The latter two comments

could also properly apply to an action involving an intersection collision where both parties claimed they had the green light. With respect to the first ground, "complexity," of itself, can never operate to deny a jury trial as apparently even IBM concedes.

It has been ten years since the *Ross* case has been decided and uncounted numbers of "complex cases," including antitrust treble damage actions, have been tried before juries without anyone ever claiming that "complexity" operated to deny the right to a jury trial. And, of course, the *Manual for Complex Litigation* recognizes that complex cases will often be tried by juries. See, *e.g., Manual of Complex Litigation,* §§ 4.12, 4.40, 4.401, 4.41.

"Complex" cases will vary greatly with respect to the degree of complexity involved. How "complex" does a case have to be before a jury trial is lost? IBM's petition does not tell us except as it says it is lost if it is so "extraordinarily complex" as to exceed the "practical abilities and limitations of a jury." If this is a proper test, how is it to be applied? How does a Court determine this question? What degree of intelligence is to be ascribed to the jury? Jurors, like the population generally, will range from the most uncomprehending to the most understanding. These, and a host of other questions, suggest themselves. IBM is contending for a rule that would be impossible to administer and would lead to endless appeals directed to the question whether there was a right to a jury trial, particularly in an antitrust treble damage action.

In the instant case this Court cannot determine whether it is "so extraordinarily" complex "as to exceed the practical abilities and limitations of a jury" by granting a writ of certiorari to the ninth circuit. This is because the record in that court is so limited that it can throw no light on this question. Although this action involves an esoteric product—computers—the legal and factual issues involved are not much different from a "nuts



and bolts" case. This case is a comparatively simple antitrust action as the opinion of the ninth circuit on the first appeal reveals. It is an action by a single plaintiff against a single defendant under only one section of the antitrust laws. The claimed monopolistic nature of IBM's practices are not difficult to understand. If the case set out in the Court of Appeals opinion at 559 F. 2d 488, is too complicated for a jury to understand, then no antitrust treble damage action is triable to a jury.

## CONCLUSION

IBM's petition for writ of certiorari should be denied.

Respectfully submitted,

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